

85,051

## REPORTER'S RECORD

## VOLUME 3 OF 3 VOLUMES

TRIAL COURT CAUSE NO. 1384794-A

COURT OF CRIMINAL APPEALS NO. WR-85,051-03

EX PARTE ) IN THE DISTRICT COURT  
)  
)  
) HARRIS COUNTY, TEXAS  
)  
)  
OBEL CRUZ-GARCIA ) 337TH JUDICIAL DISTRICT

RECEIVED IN  
\*\*\*\*\*COURT OF CRIMINAL APPEALS  
POST-CONVICTION HEARING

\*\*\*\*\* APR 24 2017

Abel Acosta, Clerk

On the 22nd day of December, 2016, the following proceedings came on to be heard in the above-entitled and numbered cause before the Honorable Renee Magee, Judge presiding, held in Houston, Harris County, Texas;

Proceedings reported by computer-aided transcription/stenograph shorthand.

**A P P E A R A N C E S**

MS. LORI DEANGELO  
SBOT NO. 24005167  
Assistant District Attorney  
1201 Franklin  
Houston, Texas 77002  
PHONE: 713.755.5800  
**ATTORNEY FOR THE STATE OF TEXAS**

**- AND -**

MS. JOANNE HEISEY  
SBOT NO. 24087704  
1700 N. Congress Ave., Suite 460  
Austin, Texas 78701  
PHONE: 512.463.8509  
**ATTORNEY FOR THE DEFENDANT**

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**I N D E X**  
**VOLUME 3**  
**(POST-CONVICTION HEARING)**

**DECEMBER 22, 2016**

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1 (Open court, defendant present, no jury)

2 THE COURT: Cause No. 1384794, State versus  
3 Obel Cruz-Garcia.

4 And we're present today on a number of  
5 different issues, but, basically, the Court set this to  
6 have proposed findings of fact submitted.

7 And before the Court is -- can you just  
8 recite your name? Joanne Heisey?

9 MS. HEISEY: Yes, Heisey, with the office  
10 of capital and forensic writs for Obel Cruz-Garcia.

11 THE COURT: And make sure she's got all the  
12 information she needs, spelling, bar number, and all  
13 that.

14 MS. HEISEY: Sure thing.

15 THE COURT: And then for the State is  
16 Ms. Lori DeAngelo.

17 MS. DEANGELO: DeAngelo.

18 THE COURT: Ms. Lori DeAngelo.

19 All right. So, why don't you start over  
20 just so we have everything on the record.

21 MS. HEISEY: Yes, Judge.

22 So, we received the Court's order for  
23 proposed findings, and we have responded by asking the  
24 Court to reconsider and rescind the order because it  
25 violates the statute and it's premature at this stage.

1           The statute makes it clear that before the  
2 Court can engage in any sort of fact-finding, that the  
3 Court first to make a determination of whether or not  
4 there are controverted issues of fact next and enter a  
5 written order of that finding. We don't have such an  
6 order yet. And, in fact, the last time that we were  
7 here, I had submitted a proposed order designating the  
8 issues. The Court had indicated that once trial counsel  
9 had submitted their affidavits, we would reconvene to  
10 reconsider that order and whether or not all the  
11 controverted fact issues have been addressed by the  
12 trial counsel affidavits. And not all has been  
13 addressed. So there are claims in the initially that  
14 don't pertain to trial counsel's effectiveness in the  
15 case.

16           And Your Honor, my concern beyond the fact  
17 that we're circumventing the procedure that's outlined  
18 in the statute is that it seems that the State has  
19 sought to have this order entered, you know, motivated  
20 primarily by arbitrariness of regime change. And  
21 frankly, wants to have the case railroad before a new  
22 D.A. can come in and decide whether she wants to have  
23 her staff follow the proper statutory procedures.

24           And beyond that, Judge, in my pleading  
25 filed in this case and also in my communications with

1 the court staff and with the D.A.'s office, I explained  
2 that myself and my co-counsel were engaged in a  
3 week-long evidentiary hearing in another capital case  
4 last week, after which I had to travel out of state for  
5 a funeral for several days.

6 And so, regardless of whether it would have  
7 been proper to enter proposed findings at this stage,  
8 which it's not, I would have had no opportunity to have  
9 done so at this point. So, for those reasons we have  
10 not submitted proposed findings and we're asking the  
11 Court to resend the order.

12 THE COURT: Okay. Ms. DeAngelo.

13 MS. DEANGELO: Actually, I'm offended that  
14 we're being accused of trying to railroad anything.

15 When you signed an order back on  
16 August 8th, 2016, the proposed order for filing  
17 affidavits, in that order it was articulated that there  
18 were controverted previously unresolved fact issues  
19 regarding ineffective assistance of counsel and we  
20 articulated them in our order, and that's the order that  
21 you signed.

22 We do have the affidavits now that were  
23 filed on November 28th of 2016. And it is entirely  
24 proper and following the statute to go ahead and require  
25 us to submit findings of facts and conclusions of law.

1 Obviously, you are by far in the best  
2 position to be able to determine the credibility of the  
3 affidavits of all of the witnesses, of the attorneys,  
4 your recollection of the facts of the case. Obviously,  
5 our interest is in not making -- our interest is not  
6 causing further delay. And I think by getting this  
7 wrapped up before you leave the bench, Your Honor,  
8 you're in the best position to make the decisions. If  
9 we wait until another judge, we are going to be starting  
10 over with someone who knows nothing about it.

11 MS. HEISEY: Your Honor, may I respond?

12 THE COURT: Yes.

13 MS. HEISEY: As far as the Court's order  
14 for trial counsel affidavits, that order does not  
15 address the controverted fact issues with respect to  
16 claims that do not pertain to the effectiveness of trial  
17 counsel. They were claims that were raised in the  
18 initial application that pertains to, for example, juror  
19 misconduct, and other claims that did not in any way  
20 entail the performance of trial counsel in the case.

21                   So, there is no possible way that those  
22 affidavits from trial counsel could have been sufficient  
23 to address the controverted fact issues with respect to  
24 those other claims.

25 MS. DEANGELO: But the record itself is

1 sufficient to be able to address those issues. It's  
2 certainly not something that we need a hearing on. The  
3 record itself is sufficient. And counsel has also  
4 submitted affidavits from the particular juror. You had  
5 communications with the juror and are in the best  
6 position to judge the credibility of Juror Bowman's  
7 affidavit and everything that happened.

8 MS. HEISEY: Well, Your Honor, just to be  
9 clear, those affidavits are not in evidence at this  
10 point. Without an order designating issues, the Court  
11 can't receive or consider any evidence outside of the  
12 pleadings.

13 So, for example, the affidavits that were  
14 submitted from trial counsel can't be considered in  
15 determining the fact issues. The affidavits that were  
16 attached to the application can't be considered.

17 THE COURT: I have to have a hearing to  
18 have those be apart of the record?

19 MS. HEISEY: It need not be a live hearing,  
20 but they need to be formally admitted. They've not been  
21 admitted at this point.

22 MS. DEANGELO: Anything that is attached to  
23 the applicant's application and our answer, the findings  
24 of fact, and anything that the attorneys have filed, all  
25 of that is properly before the Court and can be



1 considered. There doesn't have to be a special thing to  
2 happen for that to be -- I mean, we all know it's part  
3 of the record and part of what you can consider.

4 MS. HEISEY: Well, the statute makes clear  
5 that if the Court is to consider affidavits, that happen  
6 only under Section 9. And Section 9 in the statute is  
7 actually titled "hearing." And it states that the  
8 prerequisite for considering those affidavits is  
9 entering an order designating issues and an order  
10 finding that there are controverted issues of fact in  
11 the case.

12 THE COURT: Which I believe was done in  
13 August.

14 MS. DEANGELO: Yes, Your Honor.

15 MS. HEISEY: There was no order entered  
16 with respect to the -- whether or not the Court was  
17 finding that there were controverted issues of fact in  
18 the case.

19 THE COURT: The one that I signed that the  
20 State proposed, that does specifically -- I went back  
21 and reviewed it. It specifically states that.

22 MS. HEISEY: Well, with respect to the  
23 allegations of ineffective assistance of counsel. With  
24 respect to the other claims, there's been no  
25 determination of those claims as of yet.

1 THE COURT: All right. Anything further  
2 then?

3 Then your motions, Ms. Heisey -- is it  
4 Heisey?

5 MS. HEISEY: Yes.

6 THE COURT: Your motions are denied.

7 And I do intend to -- I have received the  
8 proposed findings from the State this morning. I have  
9 not read them. And so, I will make my determination on  
10 whether I agree with them in total or draft my own. But  
11 I will -- I am going to make that determination and have  
12 them filed and signed by next week.

13 In the meantime, if you have anything that  
14 you would like to submit for me to consider, you will  
15 need to do that by Tuesday because I am going to be  
16 working on this all next week. So, Tuesday, the 27th.

17 MS. HEISEY: Your Honor, if I may also note  
18 that's an ordinate short amount of time to be permitted  
19 to draft proposed findings. I do have other cases in  
20 this county, I believe we have at the least 50 cases,  
21 and more often we have on the order of 100 or more days.  
22 And so --

23 THE COURT: Okay. Well, we contacted  
24 you -- and for purposes of the record, I believe that  
25 this is in the affidavits, but you have actually delayed

1 this more than anyone here in that you refused to let  
2 the attorneys that were filing the affidavits see their  
3 file.

4 MS. HEISEY: Your Honor, the attorneys  
5 never asked me for their files.

6 THE COURT: Well, that's not what's in  
7 their affidavits --

8 MS. HEISEY: Well, that's further evidence  
9 that those attorney affidavits are not reliable if they  
10 are making those statements.

11 THE COURT: Okay. Well, let me finish what  
12 I have to say on the record and then I will let you  
13 argue whatever you want to. Okay?

14 But the fact is that you've had plenty of  
15 time to prepare your proposed findings of fact. I  
16 understand the State has a lot of things to do, too, and  
17 they have prepared them. And your schedule does not set  
18 what the Court's schedule is. So, I understand that you  
19 may have other cases. We all have other cases we have  
20 to do, but you are going to need to -- you've had these  
21 affidavits since the end of November. And I asked that  
22 you come in earlier for us to resolve some of these  
23 other issues before, and it was outside of your  
24 scheduling and you couldn't make it. So, we set today's  
25 date for coming to be heard. And I received something

1 last night via my phone that was filed at 4:30 last  
2 night for me to consider. I did read through that,  
3 because I work when I need to make a decision on  
4 something. And that's what you will need to do if you  
5 want me to consider it for next week. You don't have  
6 to. You don't have to file anything if you don't want  
7 to.

8 I am going to make my findings of fact and  
9 they will be based on my recollection and the record.  
10 So, it's not encumbered on you that you have to file  
11 anything. They are my findings. So, it may be that I  
12 don't adopt anything you put in. But you've had plenty  
13 of time to do so and you've had plenty of time to  
14 formulate them.

15 So, is there anything else that you want to  
16 put on the record?

17 MS. HEISEY: Well, yes, Judge. And that is  
18 that we certainly have not sought to delay anything in  
19 this case, but we only were served with the trial  
20 counsel affidavits after I was served with the State's  
21 motion for an order designating issues. At the time  
22 that I was served with the trial counsel affidavits, I  
23 would have first like to have filed a motion to revisit  
24 the order designating issues with respect to claims and  
25 issues that were not addressed in the trial counsel

1 affidavits, and also to have an opportunity to present  
2 evidence on behalf of Mr. Cruz-Garcia, which we have not  
3 been afforded an opportunity to do.

4               So, those are the steps that I would have  
5 liked to have taken after we received the trial counsel  
6 affidavits. Instead, we're skipping those steps and  
7 moving ahead to proposed findings without having those  
8 opportunities. So, just to state that it's not been my  
9 purpose to delay anything, but simply to follow the  
10 statutory procedure.

11               THE COURT: Okay. Well, you don't have to  
12 file something and wait for a ruling before you go to  
13 the next step. I told you -- I related that this  
14 was -- I wanted anybody that wanted to file proposed  
15 findings to file them at this time. And you could have  
16 had something prepared if you wanted to. But you didn't  
17 want to, so I don't have anything in the file. So, as I  
18 have told you, again if you want to submit something for  
19 me to consider, then please do so by Tuesday, the 27th.  
20 All right?

21               MS. HEISEY: Okay.

22               MS. DEANGELO: Thank you, Judge.

23               (Proceedings recessed)  
24  
25

**REPORTER'S CERTIFICATE**

THE STATE OF TEXAS     )  
COUNTY OF HARRIS       )

I, Mary Ann Rodriguez, Official Court Reporter in  
and for the 337th District Court of Harris County, State  
of Texas, do hereby certify that the above and foregoing  
contains a true and correct transcription of all  
portions of evidence and other proceedings requested in  
writing by counsel for the parties to be included in  
this volume of the Reporter's Record, in the  
above-styled and numbered cause, all of which occurred  
in open court or in chambers and were reported by me.

I further certify that this Reporter's Record of  
the proceedings truly and correctly reflects the  
exhibits, if any, admitted by the respective parties.

WITNESS MY OFFICIAL HAND this the 11th day of  
April, 2017.

/s/ Mary Ann Rodriguez  
Mary Ann Rodriguez, Texas CSR 3047  
Expiration Date: 12/31/2017  
Official Court Reporter  
337th District Court  
1201 Franklin  
Houston, Texas 77002  
713.755.7746

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